Supreme Court, U.S.
FILED
NOV 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

# 87-935

NO. 87-

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

STATE OF ALABAMA,

PETITIONER - APPELLEE

VS.

KENNETH JOSEPH FORTIER, JR.,

RESPONDENT - APPELLANT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF ALABAMA

## BRIEF AND ARGUMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT AND TO THE ALABAMA COURT OF CRIMINAL APPEALS

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## QUESTIONS PRESENTED

I.

DOES THE STATE HAVE TO MAKE A SHOWING OF "ABSOLUTE CERTAINTY" THAT THE EVIDENCE WOULD HAVE BEEN DISCOVERED ABSENT AN ILLEGAL ACT BEFORE A COURT CAN ADMIT THE EVIDENCE PURSUANT TO THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE?

II.

(A)

IS IT "SPECULATIVE" WITHIN THE MEANING OF NIX V. WILLIAMS, 467 U.S. 431 (1984) TO ASSUME THAT POLICE OFFICERS WITH PROBABLE CAUSE TO OBTAIN A SEARCH WARRANT TO SEARCH A HOME WOULD HAVE OBTAINED THE WARRANT HAD THE DEFENDANT NOT CONSENTED TO THE SEARCH?

(B)

IS IT "SPECULATIVE" WITHIN THE MEANING OF NIX, SUPRA, TO ASSUME THAT TRAINED POLICE OFFICERS WOULD HAVE FOUND THE ROBBERY WEAPON, WHICH WAS LOCATED IN AN OBVIOUS PLACE, WITHOUT THE DEFENDANT'S ASSISTANCE?

## PARTIES

In the Circuit Court of Tuscaloosa County, Alabama, and in the Supreme Court of Alabama, the party was Kenneth Joseph Fortier, Jr. as Defendant and Respondent, respectively, he being the Respondent herein, and the State of Alabama, as Plaintiff and Petitioner, respectively, said State being Petitioner herein. In the Court of Criminal Appeals, the parties were and are the same defendant as Appellant and the same State of Alabama, as Appellee.

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## OPINIONS BELOW

The decision and opinion of the Alabama Appellate Court, when reported, will be reported as follows:

Fortier v. State, ___ So.2d ___ (Ala. Cr. App. 1987)

A copy of the same is also appended to the petition as Appendix "A".

## JURISDICTION

Petitioner seeks review pursuant to this Honorable Court's jurisdiction under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claims involve the Fourth and Fifth Amendments.

## STATUTORY PROVISIONS

Respondent was convicted of two counts of Robbery under §13A-8-41, Code of Alabama, 1975.[1]

---

[1] §13A-8-41. Robbery in the first degree.

(a) A person commits the crime of robbery in the first degree if he violates section 13A-8-43 and he:

(1) Is armed with a deadly weapon or dangerous instrument; or

(2) Causes serious physical injury to another.

(b) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other representation by the defendant that he is then and there so armed, is prima facie evidence under subsection (a) of this section that he was so armed.

(c) Robbery in the first degree is a Class A felony. (Acts 1977, No. 607, p. 812, §3305.)

## STATEMENT OF THE CASE

Defendant was indicted by the July, 1984 Term of the Tuscaloosa County Grand Jury for robbery in the first degree. His case came for trial on October 30, 1984, and he was found guilty as charged in the indictment. After a pre-sentence investigation, the defendant was sentenced to life imprisonment without parole.

On April 28, 1987, the Alabama Court of Criminal Appeals reversed the conviction on the ground that his conviction had been obtained in violation of his Fifth Amendment right to counsel. The Court denied the State's petition for rehearing and the State's petition for certiorari to the Alabama Supreme Court was denied on September 25, 1987.

## STATEMENT OF THE FACTS

In the early morning hours of July 22, 1984, three University of Alabama students, Jagjett Sidhue, Rajseh Khedekar, and Sandeep Sharma, were leaving a local campus nightclub called the Zoo. They were approached by a young white female, identified as Tammy Gamso, who began talking to them and who also stated that she was waiting for two male friends. Shortly thereafter, two black males approached, one holding a gun, and they demanded wallets from Sidhue, Khedekar, and Sharma. The two black males fled the scene in a light-colored older model Mercedes-Benz which had been parked nearby. Sharma, at trial, stated that the defendant "looked like" one of the robbers.

Gamso testified that she, along with Wayne Donnell Jones and the defendant, went to the Zoo in defendant's car, an older model blue Mercedes. She further testified that she met the victims as she was leaving the club, and when she made it to the car, she heard Jones ask for defendant's gun. She further testified that she attempted to stop Jones but he "just pulled away". Jones and the defendant then left in the direction of the foreigners.

Later, Gamso was picked up about a block away by Jones and the defendant, who gave her a credit card belonging to Sharma. When she attempted to purchase gasoline with the stolen card several hours later in the morning, the police was called and she was apprehended. While she was talking to the police, the

defendant and Jones, who had driven by several times, stopped and walked over to talk to her, and they were also taken into custody. The officer identified defendant's car as an older model light blue Mercedes.

The defendant was taken to the University Police Department where he was advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Although the defendant gave a home address, he stated that he did not wish to make a statement without counsel and he was not questioned any further at this time.

When the officer inventoried defendant's personal items, he found a receipt for a 380 caliber chrome finish automatic gun purchased at Mack's Bait Shop which was signed by the defendant. An address listed on this receipt was

different from the earlier address given by the defendant. A third address for the defendant was obtained from Gamso.

Later, the defendant was brought back down for the officer to "explain the procedure for obtaining a search warrant". During this time the officer asked the defendant to consent to the search in order to avoid having to "get the warrant judge out of bed, this being Sunday morning" to issue a warrant. The officer also explained "how much trouble it was to write one up for me since I don't write that many." While the officer was writing the affidavit and preparing the paper work to get the search warrant, he explained to the defendant that he would have to search all the residences, including his aunt's house, and go through any place in the

house where a pistol could be hidden. The defendant was worried about the fact that his aunt's house could be searched and finally stated that he would take the officer to the gun which he subsequently did.

(1)

APPEAL

On appeal to the Alabama Court of Criminal Appeals, the defendant raised the following issues:

> Whether there was not proper proof that Appellant had been previously convicted of three felony charges in which he was represented by counsel.
>
> Whether the evidence obtained from Appellant and Appellant's apartment were excludable as fruits of an illegal arrest.
>
> Whether the trial court's denial of Appellant's motion to suppress and admission of evidence pertaining to Appellant's gun was in violation of Appellant's rights

under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 5 and 6 of the Alabama Constitution of 1901.

Whether the evidence was insufficient to support the conviction.

Whether the trial court erred in not giving Appellant's requested jury instruction or identification.

In a written opinion, the Court of Criminal Appeals made the following findings of law:

1) the evidence was sufficient to sustain the conviction of robbery by the use of force;

2) that the trial court was correct in denying to charge the jury on the identification issue;

3) that the pistol was discovered as a direct result of interrogation in violation of his Fifth Amendment right to counsel as stated in Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and that it was reversible error to admit it into evidence;

4) Although the Court did not address the issue directly, it noted that some prior convictions did not meet the statutory requirement for admission.

(2)

REHEARING

On Rehearing, the State argued that the Court of Criminal Appeals should have applied the inevitable discovery exception to the exclusionary rule and should have held evidence of the gun admissible.

The defendant, also filed for Rehearing, arguing that the evidence was insufficient to sustain the conviction, that there was no probable cause for his arrest and that the Court erred in denying to give his requested jury instruction on identification.

The Court of Criminal Appeals extended its opinion to include a discussion of the inevitable discovery rule. On the ground that it was "speculative" to assume that the officers

would have found the weapon without illegal help from the defendant, the Court again affirmed the conviction.

(3)

CERTIORARI IN THE ALABAMA SUPREME COURT

Both Parties petitioned the Alabama Supreme Court for a writ of certiorari. The State raised the following issues:

I.

WHETHER A DEFENDANT WHO HAD GIVEN NOTICE THAT HE DOES NOT WISH TO BE QUESTIONED WITHOUT A LAWYER MAY THEREAFTER GIVE CONSENT TO A SEARCH OF HIS HOME WITHOUT ADVISE FROM COUNSEL? YES

II.

WHETHER THE INEVITABLE DISCOVERY RULE CAN BE USED TO AFFIRM A CONVICTION IN A CASE WHERE OFFICER SEARCHED A HOME WITHOUT A WARRANT, BUT HAD AMPLE PROBABLE CAUSE TO OBTAIN ONE, WAS IN THE PROCESS OF OBTAINING IT, AND WOULD HAVE OBTAINED ONE HAD THE DEFENDANT

DECIDED NOT TO CARRY THE OFFICERS TO THE HOME TO LOCATE THE WEAPON IN ORDER TO AVOID HAVING HIS AUNT'S HOUSE SEARCHED BY THE OFFICERS?

In his petition, the Defendant raised the following issues:

I.

WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION?

II.

WHETHER THE TIRAL COURT ERRED IN NOT GIVING PETITIONER'S REQUESTED JURY INSTRUCTION ON IDENTIFICATION?

III.

WHETHER THE EVIDENCE OBTAINED FROM PETITIONER AND PETITIONER'S APARTMENT WERE EXCLUDABLE AS FRUITS OF AN ILLEGAL ARREST?

Both petitions were denied without comment.

## SUMMARY OF THE ARGUMENT

1) The State is not required to prove to an "absolute certainty" that evidence would have been found without illegal assistance from the defendant before the Court can allow the evidence into trial under the inevitable discovery rule.

2) It is not speculative to assume that police officers would have sought a warrant to search the home if the defendant had not consented to the search.

3) It is not speculative to assume that trained police officers would have found the gun under some clothes in a closet drawer without any assistance from the defendant.

## ARGUMENT

### I.

### THE STATE DOES NOT HAVE TO SHOW TO AN "ABSOLUTE CERTAINTY" THAT THE EVIDENCE WOULD HAVE BEEN DISCOVERED ABSENT THE ILLEGAL QUESTIONING OF AN ACCUSED BEFORE A COURT CAN APPLY THE "INEVITABLE DISCOVERY" EXCEPTION TO EXCLUSIONARY RULE TO ADMIT THE EVIDENCE.

Long before the Supreme Court adopted the "inevitable discovery exception" to the exclusionary rule in Nix v. Williams, the exception had been employed by "the 'vast majority' of all courts, both state and federal". Nix, supra, L.Ed.2d at 385 [Footnote 2]. However, when the Court in Nix adopted the exception, it did not present any guidance on the contours of the exception. United States v. Cherry, 759 F.2d 1196 (5th Cir. 1984). Because of

the confusion that has arisen over the meaning of "inevitability", this issue is presented to this Court for review and resolution.

In the opinion on this case, the Alabama Court of Criminal practically held that "inevitability" meant absolute certainty. The Opinion staes:

> "At the very least, the Nix opinion indicates the word 'inevitable' is to be taken literally." [Court of Criminal Appeals' Opinion, page 19].

However, this definition of inevitability runs counter to other authorities from which the inevitable discovery theory was derived, and this definition does not comport with the facts and meaning of the Nix decision itself.

The decision in United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980), a forerunner of Nix, conflicts with the

Court of Criminal Appeals' decision in this case. In Brookins, the Fifth Circuit held that the prosecution only has to show a "reasonable probability" that the evidence would have been discovered absent any illegal action on behalf of the police. Id at 1044. That the definition of "inevitability" in the context of the exception meant "reasonable probability" was also adopted by the Circuit Courts of Appeals in United States v. Cherry, supra, United States v. Roper, 681 F.2d 1354 (11th Cir. 1982) and in United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984), cases which, ironically, were cited by the Court of Criminal Appeals in its opinion.

State courts that have considered the showing necessary to bringing the

evidence within the orbit of the inevitable discovery exception have rejected the notion that absolute certainty is required. Note the following statement:

> "In the first place, the label 'inevitable discovery' is inaccurate and therefore misleading. The doctrine does not call for certitude as the literal meaning of the adjective 'inevitable' would suggest. What is required is that there be a very high degree of probability that the evidence would have been obtained independently of the tainted source." [Emphasis Added].

People v. Payton, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978).[2]

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[2]See U. S. v. Roper, supra where the Court noted that the "inevitable discovery" is misnamed in that it is not only applicable where the discovery is "inevitable" but also where there was a "reasonable probability" that the evidence would have been discovered by "legal means". Id. at 681 F.2d 1358.

The Alabama Court of Criminal Appeals' opinion ignores the facts of Nix itself. The Nix decision necessarily entertained a reasonable amount of speculation because it could not be said with absolute certainty that the body would have been found absent the information illegally obtained from the defendant. The decision of the Alabama Court of Criminal Appeals should be overruled on its definition of inevitability.

II.

(A)

IT IS A "REASONABLE PROBABILITY" WITH THE MEANING OF NIX TO ASSUME THAT POLICE OFFICERS, WHO HAD PROBABLE CAUSE TO BELIEVE THAT THE ROBBERY WEAPON WAS WITHIN ONE OF THE THREE ADDRESSED LISTED FOR THE DEFENDANT, WOULD HAVE SEARCHED ALL THREE RESIDENCES IN AN ATTEMPT TO LOCATE THE WEAPON.

The Court of Criminal Appeals never disputed the State's claim that the officers had probable cause to obtain a search warrant for each of the three residences listed as addresses for the defendant, and that a search warrant would have been obtained by the officers if the defendant had not consented to take them to the weapon.

While the Court of Criminal Appeals apparently conceded that probable cause

for the search warrant existed,[3] the Court nevertheless declined to apply the inevitable discovery exception on the ground that it is "speculative" to assume that the officers would have presented the warrant to a Magistrate if there had been no cooperation from the defendant. Even with due deference to the Court of Criminal Appeals, this conclusion is simply incredible. It cannot be seriously contended that police officers in general would not have followed up on any and all leads to solve a crime, and it is

---

[3]Under Alabama law, a search warrant can be issued if the affidavit supporting the warrant states facts the justify a reasonable probability that the articles are where the affiant says they are. Lewis v. State, 426 So.2d 932 (Ala. Cr. App. 1982).

certainly erroneous to make that conclusion in the instant case.[4]

The State simply submits that the question of whether the police officers in this case would have followed up on the leads by presenting their evidence to judge to secure a warrant is not the type of "speculative elements" mentioned in Nix, supra; in fact, based upon the officer's testimony, it is totally certain that a warrant would have been sought.

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[4]Prior to the defendant's consent to the search, the officer had started writing out the affidavit for the search warrant for presentation to the warrant judge [R-9, 11]. In fact, the defendant consented because he did not want the officers to get a warrant and search the home of his elderly grandmother and aunt, which was one of the addresses listed as his residence. [R-11, 18].

II.

(B)

IT IS A "REASONABLE PROBABILITY" THAT THE OFFICERS WOULD HAVE FOUND THE WEAPON DURING A SEARCH OF THE HOUSE EVEN IF THERE HAD BEEN NO ASSISTANCE FROM THE DEFENDANT.

An additional holding by the Court of Criminal appeals in its declination to apply the inevitable discovery rule is that it is speculative under Nix to assume that the officers would have eventually located the gun during the search without the assistance which had been given by the defendant. This conclusion, like the conclusion pertaining to the search warrant, ignores the facts of this case.

In the long line of cases recognizing the inevitable discovery exception prior to Nix, the courts

clearly held that the evidence found pursuant to an illegal search was admissible unless there was a showing that the evidence would not have been found during "normal police work investigation". United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980), citing Gissendanner v. Wainwright, 482 F.2d 1293 (5th Cir. 1973). The Brookins court applied a "reasonable probability" test in deciding whether the evidence would have been found by the police through normal investigations. Id. at 614 F.2d 1037, 1048.

Application of a reasonable probability standard would certainly lead to the conclusion that the officers would have located the gun absent the cooperation of the defendant. The investigating officer was well-trained

and experienced,[5] and the gun was found in a relatively obvious place[6]. Based on these facts, it is more "speculative" to assume that the officers would not have found the gun than to assume that the gun would have eventually been located.

For the reason stated herein, the Alabama Court of Criminal Appeals' application of the inevitable discovery to void this conviction should be reversed.

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[5]The investigating officer was Sgt. Larry Montgomery who had been with the University of Alabama Police Department for some time. [R-3].

[6]When the defendant led Montgomery to the gun, they found the gun under some underwear in the top drawer of a built-in closet located in the living room [R-12].

## CONCLUSION

In conclusion, the Petitioner submits the following:

1) The inevitable discovery exception does not require that the State prove to an absolute certainty that the evidence would have been found absent any assistance of the defendant;

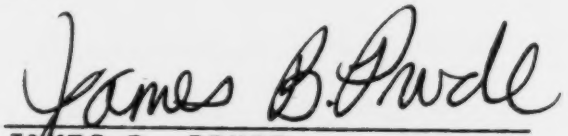
2) That is it not speculative within the concept of Nix v. Williams to assume that police officers with probable cause to obtain a warrant would have presented evidence to a Judge and obtained a warrant if there had been no assistance by the defendant;

3) That it is not "speculative" within the meaning of Nix to assume that good police investigation would not have revealed a gun hid in an obvious location.

Therefore, Petitioner State prays that this writ be granted.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY-



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## CERTIFICATE OF SERVICE

I, James B. Prude, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 25 day of November, 1987, I did serve the requisite number of copies of the foregoing on the Attorney for the Respondent, by mailing the same to said attorney, first-class postage prepaid and addressed as follows:

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